THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

NONA RINGLER,

Grievant,

v. **DOCKET NO. 2016-1061-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent, and

LARRY WAYNE BOSTIC,

Intervenor.

DECISION

Nona Ringler ("Grievant") filed this grievance on December 23, 2015, against her employer, the Department of Health and Human Resources, Bureau for Child Support Enforcement ("Respondent" or "DHHR"), challenging her non-selection as Supervisor of the Enforcement Unit. As relief, Grievant seeks instatement to the position.

Due to scheduling issues, a Level One hearing was not held on this grievance. A Level Two mediation session was conducted on June 27, 2017, without resolving the grievance, and Grievant appealed to Level Three that same day. On July 10, 2017, Larry Wayne Bostic filed to intervene in this matter. Mr. Bostic was the successful applicant for the position at issue and was granted Intervenor status by Order dated July 13, 2017. A Level Three hearing was held before the undersigned Administrative Law Judge on January 2, 2018, in Charleston, West Virginia. Grievant was represented by Gordon Simmons, with UE Local 170 of the West Virginia Public Workers Union. DHHR was represented by Assistant Attorney General Brandolyn N. Felton-Ernest. The

Intervenor appeared *pro se*. This matter became mature for decision on February 5, 2018, upon receipt of the last of the parties' post-hearing arguments.

Synopsis

Grievant is currently employed by Respondent as a Child Support Specialist III. Grievant and seven other employees applied for an open position as a Child Support Supervisor II in the Bureau for Child Support Enforcement. Grievant and the other applicants were interviewed by a three-member panel. The panel asked the same prepared questions of each applicant. All applicants met the minimum qualifications for the position. Each panel member rated Intervenor as the best applicant. Although there was some arguable deviation from established procedures in the manner in which the interview process was conducted, it was not shown that the decision reached was affected, nor that the decision to select Intervenor for the Child Support Supervisor II position at issue was an abuse of discretion or an arbitrary and capricious exercise of the authority to select which employee should receive a promotion. Accordingly, this grievance will be denied.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level Three hearing:

Findings of Fact

1. Grievant is employed by Respondent Department of Health and Human Resources ("DHHR" or "Respondent") in the Bureau for Child Support Enforcement ("BCSE"). Grievant has worked for BCSE since November 2000, a period of more than 17 years.

2. Grievant began working as an Accounting Technician III in BCSE's Financial Services Unit, now called the Auditing Unit, in 2001, and continuing until 2006. Grievant then became a Child Support Specialist II, and worked in BCSE's Customer Service Unit from 2006 to 2008. During this period, she worked in Locate, which involves finding the current whereabouts of non-custodial parents. Locate was subsequently separated from Customer Service and placed under the Enforcement Unit. Grievant was reassigned to the Central Registry within Enforcement, while continuing to assist in Locate, as needed. In September 2011, Grievant became a Child Support Specialist III, and has worked in the Central Registry Unit since April 2012. *See* J Ex 2.

3. Prior to working for Respondent, Grievant had supervisory experience as an Assistant Manager for Wendy's, supervising three employees, and District Manager for Capital Development, Inc., also supervising 3 employees in that job. *See* J Ex 2.

4. Intervenor began working for BCSE in October 2013. *See* J Ex 1.

5. Grievant provided training to Intervenor when he began working in the Child Support Enforcement Unit in 2013. Of the eight applicants, Intervenor had the least amount of tenure with Respondent. *See* J Exs 1-8.

6. Grievant has a bachelor's degree in music education. Intervenor has some college credits but has not earned a degree.

7. From 2007 to 2013, Intervenor worked for a contractor administering Kanawha County Child Support as an Assistant Team Lead, supervising eight child support specialists. *See* J Ex 1.

8. In October, 2015, Grievant, Intervenor, and six other employees submitted timely applications for promotion to a Child Support Supervisor II position in BCSE.

9. Each of the eight applicants, including Grievant and Intervenor, met the minimum qualifications for promotion to the supervisory position at issue.

10. Jonathon Burton is employed as Assistant General Counsel by BCSE. Mr. Burton is in a professional position, and does not ordinarily supervise other employees.

11. Tammy Allred is employed by BCSE as Director of Central Operations. The Child Support Supervisor II position at issue is under Ms. Allred's direct supervision.

12. Christina Orcutt is employed by BCSE as a Health and Human Resources Specialist, Senior.

13. Mr. Burton, Ms. Orcutt, and Ms. Allred comprised an interview panel to conduct interviews of the eight applicants. Each member of the panel had previously served on other promotion panels within BCSE.

14. The interview panel asked the same set of prepared questions of each applicant, rating each applicant on a Candidate Evaluation Form. *See* J Exs 1-8. As each applicant was interviewed, the panel members would individually make notes on the Candidate Evaluation Form. Each applicant was scored on each question as the question was asked, and the total score for each applicant was calculated after the interview was concluded.

15. Each interviewer scored Intervenor as their highest-rated applicant with Mr. Burton awarding a score of 51 to Intervenor, Ms. Allred awarding a score of 55 to Intervenor, and Ms. Orcutt awarding Intervenor a score of 56, resulting in a total score for Intervenor of 162. *See* G Ex 1.

16. The interviewers awarded a total score of 133 to the second highest-rated applicant, including 42 from Mr. Burton, 40 from Ms. Allred, and 51 from Ms. Orcutt. *See* G Ex 1.

17. Grievant was awarded a total score of 130 from the interviewers, including 40 from Mr. Burton, 40 from Ms. Allred, and 50 from Ms. Orcutt, making Grievant the third highest-rated applicant. *See* G Ex 1.

18. DHHR's Policy Memorandum 2106, Employee Selection, includes the following provision: "The OPS-13A, Candidate Comparison Chart, provides a summary of factors considered for all candidates. It should be used as a tool in the selection process. The more thorough the documentation and the more objective the factors considered, the less likely it will be that an unselected candidate will be successful in challenging the selection." J Ex 9.

19. The panel members did not prepare a Candidate Comparison Chart on the OPS-13 form in the process of selecting Intervenor to fill the Child Protective Supervisor II position at issue. None of the panel members recalled using a Candidate Comparison Chart in any of the selection interviews in which they previously participated.

20. The panel members observed that Intervenor possessed the most relevant supervisor experience and demonstrated the strongest ability to serve in a supervisory position based upon his responses to their inquiries.

Discussion

Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

In a case where Grievant is challenging her non-selection for a promotion, Grievant has the burden of demonstrating that her employer violated the rules and regulations governing hiring and promotions, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Vance v. Dep't of Transp*., Docket No. 06-DOH-418 (Jan. 24, 2007). *See Surbaugh v. Dep't of Health & Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997). In regard to such matters, the grievance process is not intended to be a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July

29, 1994). *See King v. Dep't of Health & Human Res*., Docket No. 2011-0527-DHHR (Oct. 12, 2012). The Grievance Board recognizes that selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *King*, *supra*; *Ashley v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-070 (June 2, 1995); *Mihaliak v. W. Va. Div. of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 3, 1998). *See Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). Therefore, unless proven arbitrary and capricious, or clearly wrong, an agency's decision regarding a selection determination will be upheld. *Ashley*, *supra*.

In reviewing an agency action to determine whether it is arbitrary and capricious, consideration should be given to whether the agency relied on prohibited factors, entirely ignored important aspects of the issue to be decided, explained its decision contrary to the available evidence, or whether the decision is so implausible it cannot be ascribed to a difference in view. *See Bedford County Memorial Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985); *Woolridge v. Dep't of Transp*., Docket No. 2008-0416-DOT (Jan. 23, 2009). Although a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the employer. *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd,* Cir. Ct. of Mercer County No. 97-CV-374-K (Oct. 16, 1998). Ultimately, the arbitrary and capricious standard of review is a deferential one which presumes an agency's actions are valid, as long as the decision is supported by

substantial evidence, or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

The Administrative Rule of the West Virginia Division of Personnel contains broad guidance regarding an agency's discretion in making promotion decisions as follows:

> In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 § 11.1(a) (2016).

The three employees who interviewed the eight applicants for the Child Support Supervisor II position at issue in this grievance had previously served on interview panels for filling positions within BCSE. Each interviewer testified credibly as to his or her rationale for rating the Intervenor higher than Grievant. None of the reasons proffered for choosing Intervenor over Grievant appeared contrived, nor were they contradicted by any substantial evidence. The evidence indicates that each applicant was asked the same series of questions prepared in advance of the interviews as a method to ensure that each applicant was treated the same as the others during the interview process. The practice of asking uniform questions selected in advance of the interviews is a completely appropriate initiative, intended to avoid asking questions that could favor one candidate over another or, more importantly, avoid asking questions about prohibited matters which could suggest bias, prejudice, or even violate federal or

state law. *Tucker v. Div. of Rehab. Serv*., Docket No. 2013-1046-DEA (Oct. 31, 2013). *See*, *e.g*., *Halpert v. Manhattan Apartments, Inc.*, 580 F.3d 86 (2d Cir. 2009); *West Coast Indus. Relations, Inc. v. NLRB*, 50 F.3d 18 (9th Cir. 1995); *King v. Trans World Airlines, Inc*., 738 F.2d 255 (8th Cir. 1984).

Although Grievant had more extensive hands-on experience in the unit and was familiar with the work performed by each member of the unit, mere tenure does not equate to being the most qualified individual to supervise the employees in a unit. An employer may properly conclude that supervisory skills are the most important attribute for filling the position. *See VanDervort v. Public Serv. Comm'n*, Docket No. 2015-0932-PSC (Nov. 14, 2016), *aff'd*, Cir. Ct. of Kanawha County No. 16-AA-118 (Dec. 12, 2017). The agency's determination that Intervenor had superior supervisory experience and skills was not shown to be clearly wrong, nor was this assessment made on an arbitrary and capricious basis. Reviewing the applicants' job applications reveals that, as confirmed by the interview panel, Intervenor had more extensive supervisory experience in terms of both the length of time he worked in a supervisory capacity and the number of employees he supervised. *See* J Exs 1 & 2.

Grievant asserts that Respondent failed to follow the requirements for conducting the selection process established in Policy Memorandum 2106. It is well established that "an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt.1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977). However, Grievant failed to establish that any failure to follow Policy Memorandum 2106 resulted in a different outcome to the promotion process. *See Metz*

v. Dep't of Health & Human Res., Docket No. 2013-2256-CONS (Aug. 7, 2014); *Frost v. Bluefield State College*, Docket No. 2011-0895-BSC (Jan. 29, 2014); *Tucker*, *supra*; *Della Mae v. W. Va. Div. of Natural Res*., Docket No. 98-DNR-204 (Feb. 26, 1999).

In this regard, Grievant relies upon *Smith v. Dep't of Health & Human Res*., Docket No. 2017-0959-DHHR (Oct. 17, 2017), *appeal pending*, Cir. Ct. of Kanawha County, and *Farley v. Dept. of Health & Human Res*., Docket No. 2012-1161-CONS (Jan. 7, 2014), *appeal pending*, Cir. Ct. of Kanawha County. In each of these grievances, there was clear evidence that a harmful error occurred, given that, in *Smith,* the applicant selected was not the applicant whose total interview score was the highest, and, in *Farley*, the applicant selected did not meet the minimum qualifications for the position being filled. These decisions are substantially different from the present grievance, where the panel did not miscalculate the total interview scores of Grievant and Intervenor, and both Grievant and Intervenor were qualified to fill the position. Similarly, in *Underwood v. Dep't of Health & Human Res*., Docket No. 2012-0237-DHHR (Dec. 6, 2013), there was substantial evidence that the grievant in that matter had significantly more supervisory experience than the successful applicant, contradicting the employer's claim that the interview panel was seeking the candidate with the most supervisory experience. The successful applicant in this matter had documented experience as a supervisor over a longer time frame. Accordingly, there is insufficient basis to find that Respondent's decision to promote Intervenor to the position of Child Support Supervisor II in the Enforcement Unit involved a harmful misapplication

of the agency's rules, constituted arbitrary and capricious decision making, or was clearly wrong.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

2. In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes that selection decisions are largely the prerogative of management and, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Mihaliak v. W. Va. Div. Of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as

to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault*, *supra*.

3. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins. V. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1986)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not substitute [his] judgment for that of the employer." *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1987), *aff'd,* Cir. Ct. of Mercer County No. 97-CV-374-K (Oct. 16, 1998).

4. In order to obtain relief on the basis of an alleged error in a promotion action, a grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different if the selection had been conducted correctly. *Metz v. Dep't of Health & Human Res*., Docket No. 2013-2256-CONS (Aug. 7, 2014); *Frost v. Bluefield State College*, Docket No. 2011-0895-BSC (Jan. 29, 2014); *Tucker v. Div. of Rehab. Serv*., Docket No. 2013-1046-DEA (Oct. 31, 2013); *Della Mae v. W. Va. Div. of Natural Res*., Docket No. 98-DNR-204 (Feb. 26, 1999).

5. Grievant failed to establish that any failure to follow the requirements of Policy Memorandum 2106 resulted in a different outcome in the selection process, or to otherwise establish that Respondent violated any statute, regulation or policy, or that it

abused its substantial discretion, when it selected Intervenor for the position of Child Support Supervisor II in the Bureau for Child Support Enforcement.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: February 20, 2018

_____

LEWIS G. BREWER
Administrative Law Judge